

PAGE 02
RECEIVED-BOCKETT
2009 APR 10 AM 11:38
PUCO

FILE FAX

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan)))))	Case No. 08-1094-EL-SSO
)	
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs)))))	Case No. 08-1095-EL-ATA
)	
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code 4905.13)))))	Case No. 08-1096-EL-AAM
)	
In the Matter of the Application of The Dayton Power and Light Company for Approval of its Amended Corporate Separation Plan)))))	Case No. 08-1097-EL-UNC

REPLY BRIEF ON BEHALF OF CARGILL, INCORPORATED

Craig I. Smith
Attorney at Law
2824 Coventry Road
Cleveland, Ohio 44120
216-561-9410
wis29@yahoo.com

Attorney for Cargill, Incorporated

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
Technician AKW Date Processed 4/10/09

Table of Contents

Introduction.....3

Statement of the Case.....4

Factual and Legal Arguments.....5

**1. The ESP Stipulation does not substitute for the exercise of
 Commission Judgment.....5**

2. Responses to Commission Staff and IEU-Ohio.....6

3. Responses to DP&L.....7

Conclusion.....12

Certificate of Service.....13

Introduction

Cargill intervened in these proceedings to protect its interests, not represented by an existing party, and to contribute to the just and expeditious approval of the proposed Electric Security Plan ("ESP") filed by Dayton Power & Light ("DP&L"). Cargill's earlier intervention in DP&L Case No. 05-276-EL-AIR resulted in signing the stipulation that extended the rate stabilization plan through 2010 ("2005 Plan"),¹ and established the Rate Stabilization Surcharge ("RSS").²

Cargill, a mercantile customer,³ purchases delivery services from DP&L, and competitive generation from a CRES supplier, for its facilities in Dayton and Sidney. DP&L serves Cargill Dayton at primary substation voltage, and Cargill Sidney at primary voltage.⁴ Cargill's Dayton and Sidney facilities are not part of an aggregation group.⁵

In this proceeding, a proposed ESP Stipulation modifies the ESP set forth in the application. Cargill refused to sign the ESP Stipulation because paragraph 3 unreasonably denies all customers during 2011 and 2012 the right to avoid paying RSS charges by agreeing to return to DP&L POLR service at market-based rates. The opinion and order of the Commission needs to further modify the ESP and the ESP Stipulation for the benefit of ratepayers and in the public interest. A modified paragraph 3 should provide that all customers, whether or not part of government aggregation, may elect not to pay RSS charges upon agreeing to return to DP&L POLR service during 2011 and

¹ In Re DP&L, Case No. 05-276-EL-AIR, Opinion and Order, dated December 28, 2005 ("RSP Decision") approving with modifications the RSP Stipulation filed November 3, 2005 ("RSP Stipulation").

² DP&L refers to the RSS as the Rate Stabilization Charge ("RSC").

³ A "mercantile customer" consumes, as a commercial or industrial customer, more than 700,000 kWh/year, or receives service as part of a national account (RC 4928.01 (A)(19)).

⁴ Cargill Ex. 1, pg. 3 (M. Frye Test.).

⁵ Tr. Pg. 33, lines 21-25 (February 24, 2009).

2012 by paying market based rates for that service. In 2013, all customers may return at SSO rates unless the Commission approved plan provides otherwise.

Statement of the Case

The ESP application continues the approved 2005 Plan through its intended termination date of December 31, 2010. The ESP makes changes to the plan by allowing for current or deferred recovery of fuel costs incurred during 2009 and 2010. The ESP also requires all customers to return to DP&L POLR service during 2009 and 2010 at market-based rates.⁶ Cargill opposed those proposed changes on the basis the 2005 Plan should continue unchanged through 2010.⁷

The ESP Stipulation, not signed by Cargill, materially modifies the ESP application by extending the 2005 Plan for two more years, through 2012. A new adjustable fuel clause not provided for by the 2005 Plan allows DP&L to timely recover its fuel costs during 2010 through 2012. The RSS approved in 2005 continues at its current rates through 2012 for DP&L to recover POLR costs. During 2010, all customers, as provided for by the 2005 Plan, pay the non-bypassable RSS to return at SSO rates.

In 2011 and 2012, after the expected end of the 2005 Plan, all customers continue to pay the non-bypassable RSS charges to return at SSO rates. However, customers

⁶ RC 4928.143 (D) continues the current plan through its approved termination; fuel recovered changed by Ex. 5, ESP filing, SSO Book 1, Chapter 5; and market-based rates proposed under Ex. 5, ESP filing, SSP Book 1, Chapter 2.

⁷ Mark Frye testimony filed January 26, 2009, pg. 3 et. seq.; testimony later withdrawn by Cargill at the February 24, 2009 hearing, and by Honda under the ESP Stipulation.

shopping as part governmental aggregation may elect to avoid the RSS by agreeing to return to DP&L POLR services at market-based rates.⁸ Paragraph 3 states that:

“The current RSS charge will continue as a nonbypassable⁹ charge through December 31, 2012. Through December 31, 2012, shopping customers who return to DP&L shall pay the Standard Service Offer (“SSO”) rate under the applicable tariff. In 2011 and 2012, governmental aggregation customers who elect not to pay the RSS will return to DP&L at a market-based rate. DP&L will develop and file for approval a market-based rate calculated consistent with Section 4928.20(I), Revised Code, by July 1, 2010.”¹⁰

The ESP application, as modified by the proposed ESP Stipulation, requires further modification to benefit ratepayers and advance the public interest. All customers during 2011 and 2012 who elect to mitigate DP&L's stand-by costs by returning at market-based rates to its POLR service should avoid RSS charges.

Factual and Legal Arguments

1. The ESP Stipulation does not substitute for the exercise of Commission Judgment.

DP&L presents the ESP Stipulation as being “entitled to substantial deference by the Commission.”¹¹ The ESP Stipulation still remains “*** merely a recommendation *** in no sense legally binding upon the commission***” since evidence presented at hearings determines whether just and reasonable. *Consumers Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St. 3d 123, 125, 592 N.E. 2d 1370, 1373, citing *Duff v. Pub. Util. Comm.* (1978), 56 Ohio St. 2d 367, 379, 384 N.E. 2d 264, 273.

⁸ ESP Stipulation and Recommendation, filed February 24, 2009 (“ESP Stipulation”), pgs. 3-4, par. 1-3.

⁹ Cargill's initial brief, at pg. 5, inadvertently hyphenated the quoted word “nonbypassable”.

¹⁰ ESP Stipulation, pg. 4, par. 3.

The ESP Stipulation does not substitute for the exercise of Commission judgment as to the public interest based on "specialized expertise and discretion," on factual matters, and "accumulated expertise" in interpreting statutes. *Monongahela Power Co. v. Pub. Util. Comm.* (2004), 104 Ohio St. 3d 571, 578, 820 N. E. 2d 921, 927-928.

2. Responses to Commission Staff and IEU-Ohio.¹²

Staff describes the ESP Stipulation as fundamentally extending the RSS for two years, until 2012, but with one change.¹³ Staff ignores the approved 2005 Plan and its RSS charges intended to end on December 31, 2010. The ESP Stipulation materially modified the plan by extending its term and the recovery of RSS charges through 2012.

Particularly, Staff ignores the unfairness and inconsistency of paragraph 3 that allows customers, as part of government aggregation, to avoid RSS charges by returning at market-based rates, while denying those rights to other customers whose return to market-based rates likewise mitigate DP&L POLR costs.

Staff offers a highly doubtful solution prompted by IEU-Ohio that Cargill could become a member of a government aggregation group to avoid RSS charges and return at market-based rates.¹⁴

Staff presents a hypothetical solution to a very real problem. No evidence in the record exists that such government aggregation groups even exist, or would aggregate for mercantile customers. Even if such aggregation groups exist between now and 2012, there is no evidence to show whether those groups function as "real" aggregators, or because of this ESP Stipulation. Further, no evidence exists that Cargill benefits from

¹¹ IEU-Ohio's Brief specifically does not address modification of the ESP Stipulation at paragraph 3.

¹² DP&L Br. at pg. 1.

¹³ Staff Br. at pg. 8.

aggregation when CRES providers price generation provided to aggregated loads based on the high and load profiles, and high and low creditworthiness of the entire group.¹⁵

As more fully discussed in response to DP&L's arguments, the legal and factual basis for benefiting ratepayers and the public interest, consistent with RC 4928.20, results from the Commission exercising its specialized expertise and discretion to modify paragraph 3. All shopping customers should have the right to avoid DP&L's RSS charges upon agreeing to, and returning to, POLR service at market rates during 2011 and 2012.

3. Responses to DP&L.

DP&L first argues no SB 221 mandate or regulatory requirement exist for changing paragraph 3 since the Commission twice approved non-bypassable RSS charges.¹⁶ Those approvals intend, however, for the 2005 Plan and its RSS charges to end December 31, 2010. Cargill supports continuation of non-bypassable RSS charges through 2010 as those orders provide.

Commission treatment of RSS charges during 2011 and 2012 is now the issue. DP&L views RC 4928.20 and RC 4928.143 as working at cross-purposes. RC 4928.20 restricts use of shopping limitations provided for under RC 4928.143 (B) (2) (d) by allowing customers of government aggregation to return at market-based rates by statutorily elected not to pay RSS charges.¹⁷

¹⁴ Staff Br. at pg. 9, citing to Tr. 39-40 (February 24, 2009).

¹⁵ Id.

¹⁶ DP&L Br. at pg. 9

¹⁷ DP&L Br. at pg. 9

Under paragraph 3, the ESP Stipulation provides DP&L the agreed upon right to continue charging for two more years RSS charges. DP&L relies on RC 4928.143 (B) (2) (d) to limit shopping by continuing non-bypassable RSS charges for all customers, other than those of government aggregation, during 2011 and 2012.¹⁸ DP&L still needs Commission approval of that language.

Approval of paragraph 3 to limit shopping opportunities for Cargill and other customers not part of government aggregation fails to benefit ratepayers and the public interest because customers avoiding RSS charges mitigate DP&L POLR costs by returning to, and paying for, market-based rates.

Second, DP&L argues Cargill failed to review the stipulation as a "package."¹⁹ DP&L focuses on Cargill witness Frye who presented expert testimony on certain aspects of the ESP Stipulation and specifically addressed paragraph 3. Cargill, as a capable and knowledgeable participant, considered the ESP Stipulation as a package, and refused to sign it upon finding paragraph 3 unreasonable. Cargill now seeks Commission protection from provisions within paragraph 3 not to the benefit of ratepayers or in the public interest.

Commission consideration of Cargill's objection occurs before, or as part, of its three-pronged test review for reasonableness. Objection by Cargill pertains to prong two of that test to require further modification to benefit ratepayers and the public interest. A modified paragraph 3 becomes part of Commission consideration on whether the ESP Stipulation meets the second-prong of that test.

¹⁸ DP&L Br. pg. 9

¹⁹ DP&L Br. pg. 10

Third, DP&L argues Cargill takes different positions,²⁰ which misses the obvious. DP&L changes the facts. Cargill opposed the ESP application whereunder the 2005 Plan continued through 2010, but with different terms and conditions. Cargill found especially egregious DP&L changing the agreed to 2005 Plan by requiring that returning customers pay for POLR services at market-based rates while continuing to pay non-bypassable RSS charges.

Cargill believes the 2005 Plan applies without change until December 31, 2010. Cargill never agreed to extending the 2005 Plan and non-bypassable RSS charges past 2010, or DP&L timely recover fuel costs through a new adjustment mechanism prior to 2010, as the ESP Stipulation now provides.²¹

DP&L mischaracterizes the facts by arguing Cargill received what asked for, and demands more, under the ESP Stipulation presented as some sort of consensus among the private or collective signatories, without reflecting their individual positions.²²

The ESP Stipulation changes the 2005 Plan into an entirely new plan for service during 2011 and 2012. For those years, the Commission needs to modify paragraph 3 to benefit ratepayers and the public interest by allowing customers not part of government aggregation to avoid RSS charges upon agreeing to return to POLR service at market-based rates.

Fourth, DP&L argues the AEP-Ohio Decision should not alter the ESP Stipulation package.²³

²⁰ DP&L Br. pg. 10

²¹ ESP Stipulation, pg. 2, par. 1-3

²² DP&L Br. pg. 11; ESP Stipulation, pg. 18., par. 35.

²³ DP&L Br. pg. 12.

The AEP-Ohio Decision recognizes some risks occur from customer switching and returning to POLR service as contracts near end during rising market prices. The Commission properly concluded that customers of government aggregators or separate CRES suppliers returning to, and paying at market prices, for POLR services mitigate those risks.²⁴ Avoidance of the POLR charge is the exchange for that commitment.²⁵

The Commission further found POLR charges avoided by customers of government aggregation or individual CRES providers in exchange for returning at, and paying for, market-based rates produce an outcome "consistent" with the election allowed under RC 4928.20 (J) for government aggregations to avoid paying stand-by charges upon agreeing to return at market price for power.²⁶

The ESP Stipulation provides an outcome inconsistent with the AEP-Ohio Case by not allowing all shopping customers to avoid RSS charges and return at market-based rates. Shopping customers not part of government aggregation continue to pay the RSS charges and return at SSO rates during 2011 and 2012 under paragraph 3, despite mitigation measures available to avoid those costs as recognized in the AEP-Ohio Decision.

DP&L defends this unjust and unreasonable result by arguing the AEP-Ohio Decision should not alter the settlement package reached in this proceeding. The AEP-Ohio Decision provides very useful guidance for the Commission to find that paragraph 3, as now written, fails to benefit ratepayers and the public interest.

²⁴ In Re Application of Columbus Southern Power Company and Ohio Power Company for Approval of Electric Security Plans, Opinion and Order, dated March 18, 2009, Case No. 08-917-EL-SSO et al. and Case No. 08-918-EL-SSO et al. ("AEP-Ohio Case"), at pg. 39-40.

²⁵ Id at 40.

²⁶ Id at 40, "requirement" inadvertently capitalized in the Cargill Initial Brief at pg. 11.

The AEP-Ohio Decision should likewise apply to the facts in this case.

Consistent with RC 4928.20 (J), and to the benefit of ratepayers and the public interest, paragraph 3 of the ESP Stipulation should allow all DP&L customers the right to avoid RSS charges in exchange for returning to, and paying for, POLR service at market-based rates. Those payments mitigate the need for DP&L to collect non-bypassable RSS charges to recover POLR costs.

DP&L intends with Commission approval to limit shopping through the collection of non-bypassable RSS charges from all customers except those as part of government aggregation by implementation of paragraph 3.

The collection of non-bypassable RSS charges to limit shopping is unreasonable under the circumstances, not beneficial to ratepayers, and not in the public interest especially since returning customers assumes the risks of market prices, and mitigate the harm to DP&L.

Paragraph 3 requires modification prior to Commission consideration on whether, as a package, the ESP Stipulation is reasonable under the second of the three-prong test.

The codified policies of RC 4928.02 guide Commission implementation of Chapter 4928. DP&L acknowledges the need for compliance with those policies by its ESP application and ESP Stipulation. DP&L uses witness Kelly's testimony in Book I as support for both. However, Mr. Kelly only addresses the ESP application. DP&L infers without testimonial or record support the ESP Stipulation also complies with state policy.

The Commission under RC 4928.06 (A) ensures state policies are put into effect, including under RC 4928.02 (A) to provide reasonably priced retail electric service; (G) implement flexible regulation to recognize continually emerging competitive electricity

markets; and (N) facilitate Ohio's effectiveness in the global market. Approval of paragraph 3 to limit shopping opportunities to all but those part of government aggregation fails to meet those codified policy guidelines.


Indeed, paragraph 3 of the ESP Stipulation inconsistently effectuates state policy. Its language requires modification by the Commission before approval for all customers to avoid RSS charges upon agreeing to return at, and pay for, POLR services at market-based rates during 2011 and 2012.

Commission exercise of specialized knowledge and expertise should conclude a modified paragraph 3 consistently applies state policies, and benefit ratepayers and the public interest during 2011 and 2012. In 2013, shopping customers return at SSO rates depending on the program approved by the Commission.

Conclusion

Cargill requests modification of paragraph 3 to benefit ratepayers and in the public interest. It should read: "In 2011 and 2012, all customers who elect not to pay the RSS will return to DP&L at a market-based rate." Further, in 2013, all customers should return to POLR service at SSO rates unless the plan approved provides otherwise.

Respectfully submitted


Craig I. Smith
Attorney at Law
2824 Coventry Road
Cleveland, Ohio 44120
216-561-9410
wis29@yahoo.com

Attorney for Cargill, Incorporated

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of this Reply Brief was served this 10th day of April by electronic mail upon the persons listed below.


 Craig I. Smith

Judi L. Sobacki
 The Dayton Power and Light Company
 1065 Woodman Drive
 Dayton, OH 45432
judi.sobacki@dplinc.com

John W. Bentine
 Mark S. Yurick
 Matthew S. White
 Chester, Willcox & Saxbe, LLP
 65 East State Street, Ste. 1000
 Columbus, OH 43215-4213
jbentine@cwslaw.com
myurick@cwslaw.com
mwhite@cwslaw.com

Henry W. Eckhart
 50 West Broad Street, Ste. 2117
 Columbus, OH 43215
henryeckhart@aol.com

David C. Rinebolt
 Colleen L. Mooney
 Ohio Partners for Affordable Energy
 231 West Lima Street, P.O. Box 1793
 Findlay, OH 45839-1793
drinebolt@aol.com
cmooney2@columbus.rr.com

Jacqueline Lake Roberts / Ann Hotz
 Michael E. Idzkowski / Rick Reese
 Gregory J. Poulos
 Assistant Consumers' Counsel
 Office of Consumers' Counsel
 10 West Broad Street, Ste. 1800
 Columbus, Ohio 43215-3485
roberts@occ.state.oh.us
hotz@occ.state.oh.us
idzkowski@occ.state.oh.us
reese@occ.state.oh.us

Charles J. Faruki
 Jeffrey S. Sharkey
 Faruki Ireland & Cox P.L.L.
 500 Court House Plaza S.W.
 10 North Ludlow Street
 Dayton, OH 45402
cfaruki@ficlaw.com
jsharkey@ficlaw.com

Samuel C. Randazzo
 Lisa G. McAlister
 Joseph M. Clark
 McNeese, Wallace & Nurick, LLC
 21 East State Street, 17th Fl.
 Columbus, OH 43215
sam@mwncmh.com
lmcalister@mwncmh.com
jclark@mwncmh.com

Robert Ukeiley
 435 R Chestnut Street, Ste. 1
 Berea, KY 40403
rukeiley@igc.org

David F. Boehm
 Michael L. Kurtz
 Boehm, Kurtz & Lowry
 36 E. Seventh Street, Suite 1510
 Cincinnati, OH 45202
dboehm@BKLlawfirm.com
m Kurtz@BKLlawfirm.com

David I. Fein
 Cynthia A. Fonner
 550 W. Washington Blvd., Suite 300
 Chicago, IL 60661
david.fein@constellation.com

poulos@occ.state.oh.us

Richard L. Sites
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620
ricks@ohanet.org

Craig I. Smith
Attorney at Law
2824 Coventry Road
Cleveland, OH 44120
Wis29@yahoo.com

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
tobrien@bricker.com

Christopher L. Miller
Gregory H. Dunn
Andre T. Porter
Nell B. Chambers
Schottenstein Zox & Dunn Co., LPA
250 West Street
Columbus, OH 43215
cmiller@szd.com
gdunn@szd.com
aporter@szd.com

Todd Williams
4534 Douglas Road
Toledo, OH 43613
williams.toddm@gmail.com

Ellis Jacobs
Advocates for Basic Legal Equality, Inc.
333 W. First St., Suite 500B
Dayton, OH 45402
ejacobs@ablelaw.org

Thomas Lindgren
Thomas McNamee
Assistant Attorneys General
Public Utilities Section
180 E. Broad St., 9th Floor
Columbus, OH 43215
Thomas.Lindgren@pic.state.oh.us
Thomas.McNamee@puc.state.oh.us

cynthia.a.tonner@constellation.com

Tasha Hamilton
Constellation Energy Group, Inc.
111 Market Place, Ste. 600
Baltimore, MD 21202
tasha.hamilton@constellation.com

Larry Gearhardt
Chief Legal Counsel
Ohio Farm Bureau Federation
280 North High Street
P.O. Box 182383
Columbus, OH 43218-2383
lgearhardt@ofbf.org

Barth E. Koyer
Bell & Royer Co. LPA
33 South Grant Avenue
Columbus, OH 43215-3927
BarthRoyer@aol.com

Nolan Moser
Trent A. Dougherty
Evan Eschmeyer
The Ohio Environmental Council
1207 Grandview Avenue
Suite 201
Columbus, OH 43212-3449
nmoser@theOEC.org
trent@theOEC.org
eeschmeyer@elpc.org

Gary A. Jeffries
Dominion Resources Services
501 Martindale St., Suite 400
Pittsburgh, PA 15212-5817
Gary.A.Jeffries@dom.com

M. Howard Petricoff
Stephen M. Howard
VORYS, SATER, SEYMOUR AND
PEASE LLP
52 East Clay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
smhoward@vssp.com
mhpetricoff@vssp.com